

PP 93-253

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Jeffrey D. Trotter, Director of Business Operations

TO: Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street N.W.
Suite 222
Washington, D.C. 20554

Dear Mr. Caton;

Please accept this comment on behalf of my company in the matter of FCC 95-263 "FURTHER NOTICE OF PROPOSED RULE MAKING", Adopted: June 23, 1995, Released: June 23, 1995 and Comment Date: July 7, 1995.

Thank you,


Jeffrey D. Trotter, Director

7-6-95
Date

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Writes: Jeffrey D. Trotter dba UniComm PCS
2403 W. Vina Del Mar Blvd.
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Jeffrey D. Trotter, Director of Business Operations

I submit to the FEDERAL COMMUNICATIONS COMMISSION in reference to FCC 95-263, FURTHER NOTICE OF PROPOSED RULE MAKING; Adopted June 23, 1995; Released June 23, 1995; Comment Date July 7, 1995.

INTRODUCTION: This small business entity addresses a situation it believes is inconsistent in the FCC's proposed measures, due to the Supreme Courts decision in Adarand Contractors, Inc. vs. Peña. -1-

BACKGROUND: As stated in the Omnibus Budget Reconciliation Act of 1993, -2- Congress authorized the FCC to award licenses by competitive bidding for certain spectrum-based services. -3- In authorizing the use of auctions, Congress directed the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and woman [collectively known as "designated entities" (DEs)] are given the opportunity to participate in the provision of spectrum-based services. -4-

Having previously submitted comments to the FCC, under a different company, for PP Docket 93-253, and watching the evolution of the rules, I believe because of the recent decision by the Supreme Court the FCC may unintentionally create a biased methodology for DEs. I focus my attention on the disparity of the proposed rules for bidding credits for DEs for broadband PCS blocks C & F.

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1. 63 U.S.L.W. 4523 (U.S. June 12, 1995).
 2. Budget Act, Pub. L. No. 103-66, Title VI, Sec. 6002(b), 107 Stat. 312 (1993).
 3. Budget Act, Pub. L. No. 103-66, Title VI, Sec. 6002(a), 107 Stat. 388 (1993).
 4. 47 U.S.C. Sec. 309(j)(4)(D).

DISCUSSION:

1. The Supreme Court has laid down a ruling and the FCC has responded by proposing amendments to Parts 20 and 24 of Chapter I of Title 47 of the Code of Federal Regulations. It is proposed that Sec. 24.712 now read (a) A winning bidder that qualifies as a small business or a consortium of small businesses may use a bidding credit of twenty five percent to lower the cost of it's winning bid. Sec. 24.713 (Tax Certificates) is removed and reserved. And a new Section 24.715 is added to Subpart H. -1-

2. Also proposed is a new Section 24.717 to be added to Subpart H to read as follows:
Sec. 24.717 Bidding credits for licenses for requery Block F.
(a) A winning bidder that qualifies as a small business or consortium of small businesses may use a bidding credit of ten percent to lower the cost of it's winning bid.
(b) A winning bidder that qualifies as a business owned by members of minority groups and/or woman may use a bidding credit of fifteen percent to lower the cost of it's winning bid.
(c) A winning bidder that qualifies as a small business owned by members of minority groups and/or woman or a consortium of small businesses owned by members of minority groups and/or woman may use a bidding credit of twenty-five percent to lower the cost of it's winning bid.
(d) Unjust Enrichment. -2-
....etc.

3. It is the disparity between the proposed Sec. 24.712 (a) and Sec. 24.717 (a), (b) & (c) that is inconsistent with the decision by the FCC to amend Part 24. We believe that the FCC is setting a stage for unintentional discrimination amongst DEs.

4. The FCC should not discriminate or create preferential bidding credits just because of one's color or gender based upon economic size (ie: small business). This creates a "sudiscrimination" of sorts. The DEs that Congress wanted to ensure competitiveness should not be categorized or sub-discriminated based upon color or gender.

5. The results of the Supreme Court's decision in *Adarand Contractors, Inc. v. Peña*, and the Commissions decisions in *Telephone Electronics Corp.*, should raise a "flag" when creating rules that are not consistent or equal in application, when giving preferences to DEs. The Commission should create equally advantageous rules that will not categorize the DEs based upon color-size, and/or gender-size. The elimination of "color-gender-size" specific differences in the rules for bidding credits would satisfy Congress' commitment and the Supreme Court's decision in leveling the playing field for all DEs involved.

1. See FCC 95-263, Appendix A, pg. 22, Sec. 24.712 (a).

2. See FCC 95-263, Appendix A, Pg. 29, Sec. 24.717 (a), (b), (c).

6. To give all DEs the same opportunity to participate and be competitive in the spectrum-based services must be the goal of the FCC. Our belief is that all DEs can use a bidding credit for of twenty-five percent to lower the cost of the winning bid.

7. The Commission must take into account that if you are to create a set-aside auction for entrepreneurs, all DEs must be treated equally. In "FURTHER NOTICE OF PROPOSED RULE MAKING" (June 23, 1995) Para. 9 & 10 state specifically the urgent situation of eliminating the race and gender provisions in the rules. Thus in doing so Sec. 24.712 is rewritten and Sec. 24.717 is created, yet both sections are inconsistent and Sec. 24.717 discriminates upon color-size and gender-size. Our belief again is for consistency of the rules for Blocks C & F when it applies to bidding credits for DEs.

8. This application of bidding credits should also apply to other spectrum-based auctions when pertaining to color-gender-size DEs.

9. If there must be an incremental bidding credit system, we also believe credits should be based solely on economic size, as stated on page 7, Para. 10 of the Commissions "PROPOSED RULE MAKING". Thus if this is so then the FCC must rethink the proposal in Sec. 24.717 (a), (b), (c).

10. A system that awards bidding credits based upon economic size may look like the following. ie:

(a) A winning bidder that qualifies as a small business or a consortium of small businesses, and has gross revenues of \$125 million in each of the last two years and total assets os less than \$500 million may use a bidding credit of ten percent towards the price of the winning bid.

(b) A winning bidder that qualifies as a small business or a consortium of small businesses, and has gross revenues of \$75 million in each of the last two years and total assets os less than \$300 million may use a bidding credit of fifteen percent towards the price of the winning bid.


(c) A winning bidder that qualifies as a small business or a consortium of small businesses, and has gross revenues of \$40 million in each of the last two years and total assets os less than \$160 million may use a bidding credit of twenty percent towards the price of the winning bid.

(d) A winning bidder that qualifies as a small business or a consortium of small businesses, and has gross revenues of \$25 million in each of the last two years and total assets os less than \$100 million may use a bidding credit of twenty-five percent towards the price of the winning bid.

11. This example would eliminate any color or gender based relationships and allow for economic size to be the determining factor for bidding credits (if it must be so).

SUMMARY: We believe that if the Commission is going to make a change of the rules pertaining to DEs, (because of the Supreme Courts recent ruling) it's rules must be uniform through-out the auctions to limit disruptions in business formations and strategies as well as eliminating the legal uncertainties that may transpire due to color and gender based preferential treatment.

Respectfully, UniComm PCS.



Jeffrey D. Trotter, Director

7-6-95
Date